Supreme Court, U.S.
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The Supreme Court of the United States

GEORGE BRENT,
Petitioner,

V.

MICHAEL DOMINGUEZ, ACTING
Secretary of the Air Force; et al,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The E.E.O.C./O.F.O. over a span of nine years(1994 thru 2003). Consistently refused to grant Petitioner a hearing and instead directed to the M.S.P.B. In May 1994, the Office of Special Counsel of M.S.P.B. reviewed petitioners claims and rendered a final decision that stated

> "Reprisal for filing an EEO complaint is also a violation of the EEO laws and thus subject to a discrimination complaint itself. However, as noted in OSC regulations at 5 C.F.R. & 1810.1., it was not intended that this office duplicate or bypass the procedures established by the agencies and the Equal Employment Opportunity Commission for resolving such discrimination complaints. Therefore, it is the policy of the Special Counsel not to take action on such allegations of discrimination; they are more appropriately resolved through the EEO process. 5 C.F.R. §1810.1.In light of the information you have provided, we find no reason to depart from our policy in this matter. Thus, we will take no further action concerning your allegations of discrimination."

(Re: OSC File NoMA-94-0540)

The questions presented are two:

1. Whether petitioners' constitutional rights of due process under the 5th amendment have been violated.

2. Whether U.S. District Court erroneously denied petitioner the right to have his claims heard by wrongly concluding that the petitioner had not exhausted his administrative remedies, and refused to apply the doctrine of equitable tolling.

PARTIES TO THE PROCEEDING

The parties to this proceeding are Petitioner George Brent; and Respondents Secretary to the Air Force, Michael Dominguez and United States Equal Employment Opportunity Commission.

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OPINIONS BELOW

The opinion of the court of appeals is reprinted in the Appendix at App.1-2 and 25. The opinion of the district courts is reprinted in Appendix at App. 3-24. The opinion of E.E.O.C./O.F.O. is reprinted in Appendix at App. 26- 28

JURISDICTION

The order of the court of appeals was entered on June 11, 2007. A timely-filed petition for rehearing en banc was denied on September 20, 2007. App. 1a-2a and 22a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 1254(1) provides, in pertinent part:

Cases in court of appeals may be reviewed by the Supreme Court by the following methods:

1. By Writ of Certiorari granted upon the petition of any part to a civil or criminal case, before or after rendition of judgment or decree;

STATEMENT OF THE CASE

This case arises out of a complaint filed in 1991 at March A.F.B in Riverside California.

During a reduction in force it appeared as though the personnel at March A.F.B. were being aligned according to race, via promotions, job performance appraisals, and various awards.

The result being minorities, particularly

African Americans losing their jobs and being denied promotions. Petitioner, an employee of eleven years at March A.F.B. asked upper management of the base to explain the obvious disparities.

The upper management not only refused to justify its' actions, they began a campaign of retaliatory actions against petitioner leading to a number of complaints to the O.S.C., E.E.O.C. in addition to U.L.P.s and arbitrations. In January of 1994 and again in April of 1994. Petitioner filed formal E.E.O. complaints naming the individuals believed to be responsible for the majority of discrimination and retaliation over the previous two years at March A.F.B.

Retaliation against petitioner continued, leading him to the union where he became a union steward and later an elected executive officer within his local. In October 1994, petitioner was removed from the position he held since he began his employment at March A.F.B. as a mechanic at the 15th Air Force Combat Operations Center and assigned what amounted to hard labor in the field. This action eventually led to permanent spinal injury of petitioner. While attempting to rehabilitate himself petitioner was unable to continue his activity within the union or his personal complaints. In August 1996 petitioner was removed from federal service by upper management of March A.F.B. Petitioner was told in writing the action was due to his permanent injury. However, when the rehabilitation specialist from the Office of worker's compensation called March A.F.B.

seeking re-employment for petitioner she was told "NO WAY" and the March A.F.B. representative went on to tell how petitioner had been "fired for cause" and that "he has two E.E.O. lawsuits against the agency" of March A.F.B. The rehabilitation specialist wrote a record of this conversation and placed it in petitioner O.W.C.P. file and the results were devastating to petitioner and his family. A copy of this record of conversation is appendix D.

Petitioner was removed from the O.W.C.P. rehabilitation program and all benefits stopped. The hearing representative of the O.W.C.P. upheld the original decision based on this record of conversation.

This record of conversation was submitted to the E.E.O.C. as evidence and positive proof that the past actions taken against petitioner were in retaliation of his filling E.E.O. complaints against the agency of March A.F.B. and the reasons given by March A.F.B. for removing him from federal service were only a pretext. Petitioner filed a timely EEO complaint against March A.F.B. alleging his removal was a retaliatory action and a continuation of the already existing EEO complaints. In 2000 and E.E.O.C. Administrative Law Judge ruled petitioners EEO complaint was proper although March A.F.B. had refused to acknowledge or process the complaint.

Thereby, adding petitioners' removal from federal service as a viable issue to the existing complaints. In November, 2003 an E.E.O.C. Administrative Law Judge issued an Order of Dismissal and Remand to Agency for issuance of FAD

and notice.

The order was issued as a result of a pre-hearing conference via telephone with both parties and the E.E.O.C. Administrative Law Judge. A record of the conversation by the A.L.J. contained in the 2003 dismissal/remand order reads as follows;

"Today the parties orally argued their positions on the pending Agency motion to send the issue of Complainant's removal from employment to M.S.P.B., in whole or in part. For the reasons stated in Agency's "Brief on Removal", attached hereto as Exhibit 2 and incorporated herein, and the regulations and portions of MD-110 cited above, the issue of the Complainant's removal is properly before the M.S.P.B.

The agency had argued to Judge Abrams in 2000 that to avoid further delay, the remaining issues should stay with E.E.O.C. for resolution. Today, the Agency did not assert that position.

Today, Complainant vigorously argued two points: first, that the termination of his employment was a "part of", "directly related to"," because of "and the culmination of the pattern of conduct which he alleged began even before 1993, which is the earliest date he alleged in the ROI before me; and second, that he did not want the case to be heard by M.S.P.B. because "this is an E.E.O. case". Despite being advised numerous times in many different ways that the M.S.P.B. was authorized to hear and resolve cases

alleging discrimination, he objected not only to any role for M.S.P.B. but also to the separation of some issues from others; even when told that the termination issue could not remain at E.E.O.C., he stated that he was not leaving E.E.O.C. and would appeal to O.F.O. rather than go to M.S.P.B., and that the issues should not be separated for hearing because "this is an E.E.O. case". He was advised that appeal to O.F.O. would further delay the resolution of his E.E.O. claims by the M.S.P.B., but he persisted in his position.

Finally, I advised him that if he though he might want to argue that the termination case could be resolved without a full hearing on the other preceding issues, he should so state now, or the entire case would be sent to M.S.P.B. He stated that he was on record that the entire course of conduct was one on-going claim, ending with his termination; that the Agency used his on the job injury as an excuse to get rid of him for retaliatory reasons. Moreover, he cited the memo produced by the Department of Labor O.W.C.P. to Senator Barbara Boxer, who had inquired on behalf of Complainant, which she then produced to Complainant and which he concluded at page 101 of the brown file he submitted to Judge Abrams on May 11, 2001, reflecting that there had been a phone call between O.W.C.P. and an unnamed representative of the agency, which had referred to the Air Force not re-hiring Complainant and referred to two lawsuits he filed against the agency. This brown file is included in the record as Ex. 3.

Therefore, based on Complainant's admissions-indeed, his insistence-that his claim of discriminatory termination is factually so related to the underlying claims, to the point that the issues are intertwined, I find that the entire case must be decided by M.S.P.B."

Petitioner did appeal the E.E.O.C. dismissal/remand order to the O.F.O. and the appeal was denied. However, the O.F.O. offered petitioner the to file again for reconsideration which petitioner did and was denied again (see app. E) and subsequently received a right to sue letter. Petitioner's complaint was timely filed in U.S. District Court.

Defendants in this matter motioned for dismissal based on the E.E.O.C.A.L.J. order, stating that petitioned failed to file in U.S. District Court within thirty days after receiving the FAD issued by the agency. The agency was ordered to issue the FAD within thirty days of the date of the order. The agency issued the order more than seventy five days late.

Petitioner engaged in appeal to the O.F.O. thirty days after the order was issued. The U.S. District Court granted the defendants motion to dismiss (see app. A) Sending petitioner to the 9th circuit court of appeals.

The appeal was denied (see app. B) and petitioner responded to the decision in petition for en banc Rehearing as follows:

MEMORANDUM OF LAW IN SUPPORT OF PETITION

The Panel's Memorandum Opinion cited the case Leorna (v) U.S. Department of State 105 F.3d 548, 551 (9th Cir. 1997) in support of its ruling that Appellant's Title VII claims were properly dismissed by the District Court because he failed to timely appeal to the M.S.P.B. or a civil action in the United States District Court.

First, in Leorna (v) U.S. Department of State 105 F.3d 548, 551 (9th Cir. 1997) supra, the Ninth Circuit implicitly stated that a claimant who proceeds without legal counsel during the E.E.O.C. pre-clearance phase is protected by equitable tolling principles and is not chargeable with constructive knowledge of the law's filing requirements (Id., p.551). Since Appellant was not represented by a lawyer during the period in which he sought to exhaust his administrative remedies before the E.E.O.C. /O.F.O. and A.L.J., the limitation period should be tolled under the authority of the Leorna ruling. Where the appellant was not represented by an attorney, Leorna, supra, does not control. Peterson (v) California Dept. of Corrections {2006 WL 3349 519(E.D. Cal) Slip Copy}. As a layperson, Appellant did not understand the complexity of the filing requirements and there is no factual basis to ascribe to him actual knowledge of the 30 day time limitation. On the issue whether Appellant had actual knowledge of the deadline, there

are at least issues of fact that necessitate an evidentiary hearing. Toxama (v) M.S.P.B. 481 F.3d 1361 (C.A. Fed. 2007). Second, since the Leorna, supra, opinion was decided in 1997, the Ninth Circuit has ruled that a District Court erred when it failed to consider "extraordinary circumstances" beyond the Appellant's control and based its refusal to toll the statute on it's erroneous belief that Appellant had not offered any explanation for the lapse, and incorrectly presumed knowledge on appellant's part given to her attorney. Even where the Plaintiff was represented by an attorney, the Ninth Circuit determined that Appellant had offered an explanation more than sufficient to toll the statute of limitation as a matter of law. Stoll (v) Ryon 165 F.3d 1238 (9th Cir. 1999). The Ninth Circuit deemed it significant that the lapse worked no prejudice to the Apples, as is true in the case at hand. The fact that the A.L.J. refused to hear Appellant's claims and made no finding was sufficient to warrant Appellant's challenge to the A.L.J. procedural order both before the E.E.O.C. /O.F.O. and then subsequently in the United States District Court. Appellant presented persuasive evidence to the District Court that he had been discriminated against and that his protest and complaints processed through established administrative process resulted in retaliation that culminated in his firing (see Exhibit 6). On these unrebutted facts, the Panel should have applied the doctrine of equitable tolling in Appellant's favor. The Panel erred in that it barred Appellant from pursuing his claims. Even the Appellees' admitted in their Answering Brief that the FAD afforded Appellant the right to seek judicial

review of the E.E.O.C. /O.F.O. decision denying his challenge to the Procedural Order issued by A.L.J. Mulligan (p. 12, second paragraph). It was not futile for the Appellant to appeal the O.F.O. denial of his request for reconsideration. In determining whether to apply equitable tolling principles, the United States Supreme Court has weighed other and additional factors, apart from whether Appellant received adequate notice of the deadline. Baldwin County Welcome Ctr. (v) Brown 466 U.S. 147, 151 (1984). Further, Appellant was justified in relying on the Instructions that he received from the Office of Special Counsel, M.S.P.B. (Exhibit 4). As such, this undeniable official instruction argues for the application of equitable estoppel as grounds to excuse the filing delay, especially where the purposes of the limitation period were satisfied. Santa Maria (v) Pacific Bell 202 F.3d 1176 (9th Cir. 2000)(omitted).

The Ninth Circuit has also declared that if Appellant had chosen the M.S.P.B. appellate route (which he did not) and his discrimination claims had been dismissed, his Title VII statute of limitation would have been tolled to allow him to have exhausted his E.E.O.C. administrative remedies and filed in federal court. Sloan (v) West 140 F. 3d 1255 (9th Cir. 1998) (at p. 1262). Appellant should enjoy no less right by choosing to pursue his appeal, uninterruptedly, through the E.E.O.C. process. (29 C.F.R. 1614.302(d)(l)(ii) & (3), δ1614.310(a), Sloan 140 F.3d at 1260; (See Morales (v) Merit System Protection Board) 932 F.2d 800, 802 (9th Cir. 1991).

It is significant that Title VII's statute of limitation is not a jurisdictional requirement. It may be waived and equitably tolled. Sloan, supra, Valenzuela (v) Kraft Inc. 801 F.2d 1170, 11174 (9th Cir. 1986). Petitioner was denied an enbanc rehearing (see app. C)

Reason for Granting the Petition

Petitioner relied upon the instructions given by the O.S.C/M.S.P.B. (Quoted in questions presented) and subsequently without deviation pursued his claim through the E.E.O.C. /O.F.O. for the following nine years. Strangely, the E.E.O.C./O.F.O. had in it's possession a copy of the instructions in 2003 when it directed petitioner to seek recourse again through the M.S.P.B. Petitioner also relied on 29 C.F.R. 1614.302(b). Filing a formal EEO complaint constitutes an election to proceed in the EEO forum.

The U.S. District Court misconstrued and misapplied the doctrine of equitable tolling of the thirty day statue of limitation such that petitioner was placed in the position of having to seek an appeal to the U.S. District Court before he had fully exhausted his administrative remedies through the Office of Federal Operations and also obtain a right to sue letter within the thirty day limitation, all of which were impractical and impossible to achieve.

Specifically the 9th Circuit in refusing to grant the petition failed to follow its own precedence notably as outlined herein.

CONCLUSION

For the foregoing reasons, the petition should be granted. In the alternative, this Court should invite the views of the Solicitor General.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
[Filed JUN 11, 2007]

No. 06-55130
D.C. No. CV-05-00091-VAP

GEORGE BRENT,
Plaintiff-Appellant,
v.
MICHAEL DOMINGUEZ,
Acting Secretary of the Air Force; *et al.*,
Defendant-Appellees.

Appeal from the United States District Court
for the Central District of California
Virginia A. Phillips, District Judge, Presiding

MEMORANDUM ·

Submitted June 5, 2007 ··

Before: LEAVY, RYMER, and T.G. NELSON,
Circuit
Judges.

· This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

·· The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App.. P. 34(a)(2).

George Brent appeals pro se from the district court's order dismissing his action alleging violations of Title VII of Civil Rights Acts of 1964, 42 U.S.C. § 2000e *et seq.*, by the Untied States Air Force ("Air Force"), and violations of the Administrative Procedures Act ("APA"), 5 U.S.C. § 551 *et seq.* We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo. Jones v. Blanas, 393 F.3d 918, 926 (9th Cir. 2004) (dismissals based on a statue of limitations); id. (decisions whether to apply equitable tolling where the facts are undisputed); *Hale v. Norton*, 476 F.3d 694, 697, (9th Cir. 2007) (dismissals for lack of subject matter jurisdiction). We affirm.

The district court properly dismissed Brent's Title Vii claims because, despite the Air Force's clear notice to him of his rights, Brent failed timely either to appeal thc Air Force's Final Agency Determination of his discrimination claims to the Merit Systems District Court. *See Leorna v. U.S. Dep't of State*, 105 F.3d 548, 551, (9th Cir. 1997) (explaining that the doctrine of equitable tolling "has been consistently applied to excuse a claimant's failure to comply with the time limitations where she had *neither actual nor constructive notice* of the filing period") (emphasis added).

We do not address the merits of the district court's dismissal of Brent's APA claims because, in his reply brief, Brent conceded that the dismissal of those claims was proper.

AFFIRMED

APPENDIX B
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
(Filed JUL 26, 2005)

No. EDCV 05-91-VAP (SGLx)

George Brent,
Plaintiff,

v.

MICHEAEL DOMINGUEZ, etc.; et al.,
Defendants

ORDER GRANTING DEFENDANT MICHAEL DOMINGUEZ'S MOTION TO DISMISS

Motion filed on June 23, 2005

Defendant Michael Dominguez's Motion to Dismiss came before the Court for hearing on July 25, 2005. After reviewing and considering all papers filed in support of, and in opposition to, the Motion, as well as the arguments advanced by counsel at the hearing, the Court GRANTS Defendant's Motion to Dismiss.

I. BACKGROUND

This case arises out of a series of employment discrimination charges Plaintiff George Brent has made against the United States Air Force, his former employer, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. After pursuing his claims through a number of administrative complaints, Mr. Brent filed his initial Complaint with this Court on February 3, 2005, and his First Amended Complaint ("FAC") on June 10, 2005. His First Amended Complaint reasserts against Michael Dominguez, Acting Secretary of the Air Force, the discrimination allegations made in the administrative complaints and also brings an administrative law judge and the Equal Employment Opportunity Commission ("EEOC") [FAC 88-96.]

The Court takes judicial notice of the following documents appended to Defendant Michael Dominguez's Motion to Dismiss ("Mot"), to which Plaintiff also adverts in his Opposition to the Motion "(Opp"): Complaint of Discrimination in the Federal Government, March AFB Docket No. MD94004; Complaint of Discrimination in the Federal Government, March AFB Docket No. MD94008; April

A tangled procedural history precedes the filing this action.[1] The critical points, on which the parties agree, are as follows. Mr. Brent filed formal Equal Employment Opportunity ("EEOC") complaints on January 18 1994, and April 28, 1994. [FAC ¶¶ 35, 47; Opp'n Exs. C, G.] The Air Force subsequently dismissed him from his position, and his claim that his removal was motivated by discrimination was consolidated with his pending EEO administrative complaints on April 21, 2000. [FAC¶¶54, 66; Mot. Ex LL.] On November 24, 2003, the administrative law judge dismissed Mr. Brent's case and remanded it to the Air Force for a final agency decision ("FAD").[3][FAC ¶ 72; Mot. Ex 00.]

While the case was pending with the Air Force, Mr. Brent appealed the dismissal and remand to the EEOC, which denied the appeal on August 26, 2004. [FAC ¶¶ 70, 84; Mot. Ex. SS.] The Air Force then issued its FAD on March 16, 2004. [Mot. Ex. QQ; Opp'n at 4.] Mr. Brent requested reconsideration of the EEOC decision, and the EEOC denied the request on November 4, 2004. [FAC ¶¶ 70, 86; Mot. Ex. UU.] Mr. Brent, however, did not appeal the issuance of the FAD. This action is followed.

21, 2000, Order re Motion to Amend; November 24, 2003, Order of Dismissal and Remand to Agency for Issuance of FAD and Notice; March 16, 2004, Department of the Air Force Final Decision; August 26, 2004. EEOC Decision; November 4, 2004, EEOC Denial of Request for Reconsideration. Mot Exs. C, G, LL, OO, SS, UU. See Mir v. Little Co. of Mry Hosp., 844 F.2d 646, 649 (9th Cir 1988) (on motion to dismiss court may "take judicial notice of matters of public record outside the pleadings") (quotation marks omitted).

Defendant Michael Dominguez now moves to dismiss, arguing that this entire action is time barred because it was filed more than thirty days after the Air Force's FAD.[Mot.at 14-16.] In the alternative, he contends that Mr. Brent

Either failed to raise his individual allegations of discrimination during the administrative process or raised them beyond the permitted time period. [Id. at 10-14.] Defendant filed his Opposition on July 11, 2005, and Defendant filed his Reply on July 15, 2005.

II. LEGAL STAND

Under Federal Rule of Civil Procedure 12(b) (6), a party may bring a motion to dismiss for failure to state a claim upon which relief can be granted. 4 Dismissal is appropriate when it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations set forth in the complaint. See Williamson v. General Dynamics Corp., 208 F.3d 1144, 1149 (9th Cir. 2000) ; Big Bear Lodging Ass'n v. Snow Summit, Inc., 182 F.3d 1096, 1101 (9th Cir. 1999).

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[2] The parties state that this second complaint was filed on April 22, 1994. FAC 47; Mot. at 6. In fact, while Mr. Brent's signature line is so dated, the official date stamp indicates April 28, 1994, as the filing date. See Mot. Ex. G

This use of the word "dismissal" is misleading. The judge's order directed the Air Force to complete processing of Plaintiff's claims on the merits; it did not terminate Plaintiff's administrative complaint. See Mot. Ex 00 at 114.

The Court must view all allegations in the complaint in the light most favorable to the non-moving party and must accept all material allegations – as well as any reasonable inferences to be drawn from them – as true. See Big Bear Lodging Ass'n, 182 F.3d at 1101; American Family Ass'n Inc. v. City and County of San Francisco, 277 F.3d 1114, 1120 (9th Cir. 2002)

The scope of review under Rule 12(b) (6) is generally limited to the contents of the complaint. Clegg v. Cult Awareness Network, 18 F.3d 752, 754 (9th Cir. 1994). Nevertheless, "a document is not 'outside' the complaint if the complaint specifically refers to the document and if its authenticity is not questioned." Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1993), overruled on other grounds by Glabraith v. Santa Clara, 307 F. 3d 1119, 1125-27 (9th Cir. 2002). The Court may also consider exhibits submitted with the complaint, Hal Roach Studios v. Richard Feiner & Co.; 896 F.2d 1542, 155 n.19 (9th Cir. 1990), and "take judicial notice of matters of public record outside the pleadings, "Mir, 844 F.2d at 649 (quotation marks omitted).

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4 "Federal court jurisdictionfor a review of discrimination complaints in the federal sector requires an exhaustion of administrative remedies. "Tanious v. Internal Revenue Service, 915 F.2d 410, 411 (9th Cir. 1990). Compliance with Title VII's time limits, however, compliance with the presentment of discrimination complaints . . is a jurisdictional perquisite. " Sommatino v. United States, 255 F.3d 704, 708 (9th Cir. 2001).The Court therefore evaluates Defendant's contention of untimeliness under Federal Rule of Civil Procedure 12 (b) (6). Because the Court finds this attack on

III. DISCUSSION

Because Plaintiff's allegations of discrimination include his removal, his administrative complaint fell within the scope of both the EEOC and Merit Systems Protection Board ("MSPB") administrative schemes. 5 Administrative review of "mixed cases" of this kind, 29 C.F.R. § 1614.302(a) (1), (2), is governed by 5 U.S.C. § 7702 and its implementing regulations.

A mixed case complainant may file initially with MSPB or with his employing agency. 5 U.S.C. § 7702 (a) (2). 29 C.F.R. 1614.302(b). If he files with his employing agency, which is the path Mr. Brent chose, the agency must resolve the complaint within 120 days. 5 U.S.C. § 7702 (a) (2). Once it does so, the complainant has thirty days either to appeal

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(4. ... continued)
Plaintiff's action dispositive, it does not reach Defendant's assertion that Plaintiff failed to present his claims during the administrative process, an argument properly analyzed under Ferderal Rule of Civil Procedure 12 (b) (1).

5 The MSPB "adjudicate[s] Federal employee appeals of agency personnel actions, "5 C.F.R. § 1200.1 and its "appellate jurisdiction" includes appeals from removal, see id. § 1201.3 (1) – (3).

6 Even if a complainant chooses to appeal to the MSPB rather than commence a civil action, he still has opportunities to seek judicial review. For instance, following a decision by the MSPB, the complainant has thirty days to file a civil action or petition the EEOC for review of the MSPB determination. 5 U.S.C. § 7702 (a)(3) (A), (b) (1); 29 C.F.R. § 1614.310 (b).

that decision to the MSPB or file a civil action. 6 Id., 29 C.F.R. §§ 1614.302(d) (3), 1614.310(a). If the agency does not resolve the complaint in 120 days, the complainant may also appeal to the MSPB or file a civil action.7 5 U.S.C. § 7702 (e) (1) (A), (2) ; 29 C.F.R. §§ 1614.302 (d) (1) (i), 1614.310 (g).

When the Air Force issued its FAD, then, Mr. Brent had thirty days either to appeal his case to the MSPB or file a complaint in federal court. This action therefore is untimely. Mr. Brent acknowledges his failure to bring this action within thirty-day time limit; however, he counters, the inordinate length of time his complaint remained in the administrative process, especially the Air Force's delay in issuing its FAD, permits equitable excusal of his noncompliance. [See Opp'n at 11-12.] He also argues that the administrative law judge's order dismissing and remanding his case was improper. [Id. at 12-16]

The time limitations imposed by the Title VII scheme are "requirement[s] subject to waiver, estoppel and equitable tolling." See Sommantino, 255 F.3d at 708. Nevertheless, Plaintiff's recourse to equity is unavailing. Defendant Michael Dominguez clearly has not waived the statute of limitations defense. Nor do the doctrines of estoppel and equitable tolling apply here.

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7 An agency's failure to resolve a complaint within 120 days does not indefinitely extend a complainant's time to bring a civil action. Under 5 U.S.C. § 7702 9(e) (1) (A), the complainant is entitled to file a civil a civil action " to the

"Equitable estoppel focuses on the defendant's wrongful actions preventing the plaintiff from asserting his claim." Leong v. Potter, 347 F.3d 1117, 1123 (9th Cir. 2003). Mr. Brent does not allege any conduct on the part of Defendant that prevented him form filing his claims. Once 120 days had expired from the filing of his administrative complaints, Mr. Brent was free to bring a civil action without waiting for further Air Force review of his allegations. 5 U.S.C. § 7702(e) (1) (A); 29 C.F.R. §§ 1614.302 (d) (1) (i), 1614.310(g). The Air Force was required to notify Mr. Brent of this right, 29 C.F.R. § 1614.302 (d) (1) (i), and Mr. Brent does not contend that it failed to do so. Thus, whatever the reason for the Air Force's prolonged delay in processing these claims, that delay did not interfere with Plaintiff's commencement of a civil action.

"Equitable tolling focuses on a plaintiff's excusable ignorance and lack of prejudice to the defendant. The doctrine of equitable tolling has been consistently applied to excuse a claimant's failure to comply with the time limitations where she had neither actual nor constructive notice of the filing

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(7 ...continued)
same extent and in the same manner as provided in section 717 (c) of the Civil Rights Act of 1964 (42 U.S.C. §2000e-16 (c)." § 2000e-16 (c) permits a complaint to file a civil action because of agency inaction "until such time as final action may be taken by ...[the] agency."

"Equitable tolling focuses on a plaintiff's excusable ignorance and lack of prejudice to the defendant. The doctrine of equitable tolling has been consistently applied to excuse a claimant's failure to comply with the time limitations where she had neither actual nor constructive notice of the filing period." Leong, 347 F.3d at 1123 (citations and quotations marks omitted). Mr. Brent cannot claim excusable ignorance. The FAD advised him that he had thirty days to file a civil action, quoting 29 C.F.R. § 1614.310 (a) and reiterating that "the civil action must be filed within the applicable time limit." [Mot. Ex. QQ at 144-45.]

As for Mr. Brent's criticisms of the administrative law judge's actions, as Defendant points out, [Reply at 8], Mr. Brent offers no authority for the proposition that allegedly erroneous decisions by the judge should somehow extend the time limit for filing a civil action. 8

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8 Moreover, despite Plaintiff's vehement objections to the November 24, 2003, Order of Dismissal and Remand, the order appears proper. The administrative scheme does not provide for hearings on mixed cases before an EEOC administrative law judge. See 29 C.F.R. § 1614.302 (d) (2); Thus, once the judge concluded that Mr. Brent's complaint constituted a single mixed case, she was without authority to conduct a hearing on it.

According to Plaintiff, EEOC decisions dictate that the judge should have heard the removal issue along with the other allegations because they are all "intertwined." [Opp'n at 15.] The case Plaintiff cites in support of this argument; however, Amie L. Shaw, E.E.O.C. Doc. 05930370, 1994 WL 727959 (July 15,1994), is inapposite. In Shaw, the EEOC reversed its earlier ruling that an appeal from a final agency

CONCLUSION

For the foregoing reasons, Defendant Michael Dominguez's Motion to Dismiss is GRANTED.

IT IS SO ORDERED.

Dated: July 26, 2005 /s/ VIRGINIA A. PHILLIPS
VIRGINIA A. PHILLIPS
United States District Judge

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8 (...continued)

decision on removal was premature because it had not been appealed to the MSPB. In its decision, the EEOC relied on "the particular facts of [the] case, " noting that the appellant's removal had been entirely processed to an agency finding of retaliation and that "the only live question presented by the case is the appropriateness of the remedy that was awarded by the agency." Id. at *3

Shaw addresses whether a mixed case complainant must always appeal a final agency decision to the MSPB rather than the EEOC. Though connected, that question appears distinct from whether and EEOC administrative judge may hear mixed cases in the first instance. In addition, in contrast to Shaw, Plaintiff's case was far from being entirely processed at the time the administrative law decision. Finally, the Court notes, Shaw is an exception discrimination which are not independently appealable to the MSPB, but which are 'inextricably intertwined' with an appealable action, should be raised in that forum." John R. Stan, E.E.O.C. Doc. 05960266, 1198 WL 264238, at *3 (May 19, 1998) (citation omitted).

APPENDIX C
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
(Filed NOV 18, 2005)

No. EDCV 05-91-VAP (SGLx)

George Brent,
Plaintiff,

v.

MICHEAEL DOMINGUEZ, etc.; et al.,
Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

Motion filed on September 25, 2005

The Court had received and considered all papers filed in support of, and in opposition to, Defendants' Motion to Dismiss. The Motion is appropriate for resolution without hearing. See Fed. R. Civ. P. 78; Local Rule 7-15. For the reasons set forth below, the Motion is Granted.

I. BACKGROUND

This case arises out of a series of employment discrimination charges Plaintiff George Brent has made against the United States Air Force, his former employer, under Title VII of the Civil Rights Acts of 1964, 42 U.S.C. § 2000e et seq. After pursuing his claims through a number of administrative complaints, Plaintiff filed his initial Complaint with this Court on February 3, 2005, and his First Amended Complaint ("FAC") on June 10, 2005. His First Amended complaint reasserts against Michael Dominguez, Acting Secretary of the Air Force, the discrimination allegations made in the administrative complaints[1] and also brings an Administrative Procedure Act ("APA") claim directly against Administrative Law Judge ("ALJ") Kathleen Mulligan and the Equal

[1] This claim was dismissed on July 26, 2005, pursuant to the Court's July 26, 2005 , Order Granting Defendant Michael Dominguez's Motion to Dismiss.

[2] The Court takes judicial notice of the following documents appended to Defendant Michael Dominguez's Motion to Dismiss ("Dominguez's Mot."), to which Plaintiff also adverts in his Opposition to the Motion ("Opp'n"): Complaint of Discrimination in the Federal Government, March AFB Docket No. MD94004; Complaint of Discrimination in the

Employment Opportunity Commission ("EEOC") (collectively, " Defendants") stemming from ALJ Mulligan's Order remanding Plaintiff's claim to the Air Force for a Final Agency Determination. [FAC ¶¶ 88-96.].

A tangled procedural history precedes the filing of this action.[2] The critical points, on which the parties agree, are as follows. Plaintiff filed formal Equal Employment Opportunity ("EEOC") complaints on January 18, 1994, and April 28, 1994. [FAC ¶¶ 35, 47.] The Air Force subsequently dismissed him from his position, and Plaintiff's new claim that his removal was motivated by discrimination was consolidated with his pending EEO administrative complaints on April 21, 2000. [FAC ¶¶ 54, 66; Dominguez's Mot. Ex. LL] On November 24, 2003, Defendant ALJ Mulligan dismissed Plaintiff's case and remanded it to the Air Force for a final agency decision ("FAD").[3] [FAC ¶ 72; Dominguez's Mot. Ex 00.]

Federal Government, March AFB Docket No. MD94008; April 21, 2000, Order re Motion to Amend; November 24, 2003, Order of Dismissal and Remand to Agency for Issuance of FAD and Notice; March 16, 2004, to Department of the Air Force final Decision; August 26, 2004, EEOC Decision; November 4, 2004, EEOC Denial of Request for Reconsideration. [Dominguez's Mot. Exs. C, G, LL, OO, QQ, SS, UU.] See Mir v. Little Co. Of Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1988) (on motion to dismiss court may "take judicial notice of matters of public record outside the pleadings") (quotation marks omitted).

While the case was pending with the Air Force, Plaintiff appealed the dismissal and remand to the EEOC, which denied the appeal on August 26, 2004. [FAC ¶¶ 70, 84; Dominguez's Mot. Ex. SS.] The Air Force then issued its FAD on March 16, 2004. [Dominguez's Mot. Ex QQ.] Plaintiff requested reconsideration of the EEOC decision, and the EEOC denied the request on November 4, 2004. [FAC ¶¶ 70, 86; Dominguez's Mot. Ex. UU.] Plaintiff, however, did not appeal the issuance of the FAD. This action followed.

Defendants filed a Motion to Dismiss ("Mot.") on September 29, 2005, arguing that the Court lacks subject matter jurisdiction over Plaintiff's APA claim and that Plaintiff fails to state a claim upon which relief can be granted. [Mot. at 1.] Plaintiff filed an Opposition to Defendants' Motion to Dismiss ("Opp'n") on October 11, 2005. Defendants filed their Reply of October 14, 2005.

II. LEGAL STAND

A. Motion to Dismiss Under Rule 12 (b) (1)

Pursuant to Federal Rule of Civil Procedure 12 (b) (1), a district court must dismiss an action if the court lacks jurisdiction over the subject matter of the suit. Fed. R. Civ. P. 12 (b) (1). The party seeking to invoke federal jurisdiction bears the burden of establishing that jurisdiction exists. Scott v. Breeland, 792 f. 2d 925, 927 (9th Cir. 1986). A complaint will be dismissed under Rule 12(b) (1) for lack of subject matter jurisdiction if (1) the cause does not "arise under" any federal law or the

United States Constitution, (2) there is no cause or controversy within the meaning of that constitutional term, or (3) the cause is not one described by any jurisdictional statute. Baker v. Carr, 369 U.S. 186, 198 (1962).

B. Motion to Dismiss under Rule 12(b) (6)

Under Rule 12(b)(6), a party may bring a motion to dismiss for failure to state a claim upon which reflief can be granted. Dismissal is appropriate when it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations set forth in the complaint. See Williamson v. Gen. Dynamics Corp., 208 F.3d 1144, 1149 (9th Cir. 2000); Big Bear Lodging Ass'n v. Snow Summit, Inc., 182 F.3d 1096, 1101 (9th Cir. 1999).

The Court must view all allegations in the complaint in the light most favorable to the non-moving party and must accept all material allegations – as well as any reasonable inferences to be drawn from them as true. See Big Bear Lodging Ass'n, 182 F.3d at 1101; American Family Ass'n, Inc. v. City and County of San Francisco, 277 F.3d 1114, 1120 (9th Cir. 2002).

The scope of review under Rule 12(b) (6) is generally limited to the contents of the complaint. Clegg v. Cult Awareness Network, 18 F.3d 752, 754, (9th Cir. 1994). Nevertheless, " a document is not 'outside' the complaint if the complaint specifically refers to the document and if its authenticity is not questioned." Branch v. Tunnell,

14 f.3d 449, 453 (9th Cir. 1993), overruled on other grounds by Galbraith v. Santa Clara, 307 F.3d 1119 1125-27 (9th Cir. 2002). The Court may also consider exhibits submitted with the complaint, Hal Roach Studios v. Richard Feiner & Co., 896 F. 2d 646, 649 (9th Cir. 1988) (quotation marks omitted).

III. DISCUSSION

A. Subject Matter Jurisdiction

Defendants argue that the Eleventh Amendment provides them immunity from Plaintiff's suit. [Mot. at 2.] They contend that although Plaintiff's APA claim contains a limited waiver of the government's sovereign immunity, the claim is not properly before the Court. Defendants assert that Plaintiff's First Amended Complaint fails to establish that Defendant ALJ Mulligan's Order to Remand was a final agency decision not otherwise subject to judicial review. [Mot. at 2-3.]

Plaintiff fails to oppose directly Defendants' contentions. Instead, Plaintiff argues that (1) he has properly alleged that he has suffered determinate consequences resulting from Defendant ALJ Mulligan's Order, and (2) there is no adequate remedy at law to redress his damages. [Opp'n at 3-4].

The APA provides judicial review to "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5

U.S.C. § 702. In other words, to allege properly an APA claim, a person must (1) "identify some agency action4 that affects him [or her] in ... a specified fashion," and (2) "show that he [or she] has suffered legal wrong because of the challenged agency action, or is adversely affected or aggrieved by the action within the meaning of a relevant statue." Lujan v. National Wildlife Federation, 497 U.S. 871, 882-83 (1990). The type of agency action reviewable is an "[a]gency action made reviewable by statute and [a] final agency action for which there is no other adequate remedy in a court .... A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. " 5 U.S.C. § 704.

1. Plaintiff has not Alleged that Defendants Violated A Rclevant Statue.

Defendants do not argue that Plaintiff's First Amended Complaint fails to allege what legal wrong he has suffered or how he has been adversely affected or aggrieved within the meaning of a relcvant statute. 5 The Court, however, has a sua sponte duty to ensure that it has subject matter jurisdiction over Plaintiff's First Amended Complaint. See Stockton Christian Life Center, Inc. v. I.R.S., 172 F. Supp. 2d 1292, 1294 (E.D. Cal. 2001).

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4 Section 701 defines "agency action" as it is defined in 5 U.S.C. § 551, "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 701 (b) (2).

While § 702's language is broad, "the statute does not confer jurisdiction independent of some other specific statute" and a Plaintiff must aver in his or her complaint how the agency failed to act as required by law." Office of the Governor v. Dep't of Health and Human Servs., 997 F.2d 1290, 1292 (9th Cir. 1993). "Section 702 does not create substantive rights. There is no right to sue for a violation of the APA in the absence of a relevant statute whose violation forms the legal basis for the complaint." El Rescate Legal Servs., Inc. v. Executive Office of Immigration Review, 959 F.2d 742m 753 (9th Cir. 1992)(holding that when Plaintiff has not shown a violation of the I&NA, there can be no APA claim)(internal quotation marks omitted).

Plaintiff's First Amended Complaint fails to allege the relevant statue that forms the legal basis of his claim. Plaintiff alleges that (1) he never had a hearing on his claims, (FAC ¶ 92) and (2) Defendant ALJ Mulligan's Order was not in accordance with past EEOC authority, [FAC ¶ 94]. Plaintiff's First Amended Complaint lacks an allegation that Defendants violated any relevant statute.

The only reference to a statue within Plaintiff's First Amended Complaint is one to Title VII. In Plaintiff's prayer for relief, he writes; " a declaratory judgement that, the failure of the EEOC to bring Brent's complaints to hearing for over four years and the ruling of ALJ Mulligan dismissing Brent's three complaints and remanding

them to the [Air Force] for a final agency decision were arbitrary and contrary to law and therefore violate the provisions of the APA and of Title VII." [FAC "Prayer for Relief" ¶ 1.] The Court finds that this does not suffice to establish a proper APA claim. Although Plaintiff's first claim against the Secretary of the Air Force purported to rest on Title VII, it is unclear whether or not Plaintiff is alleging that Defendants violated Title VII by remanding Plaintiff's action for a FAD.

Even if Plaintiff indeed were alleging that Defendants violated Title VII, the Court finds such a claim has not been adequately stated here. Among other flaws in Plaintiff's Complaint, it fails to name a proper defendant. 42 U.S.C. §2000e-16 (requiring that in a civil action under Title VII, the head of the department, agency, or unit, as appropriate, shall be the defendant). Here, if Plaintiff is attempting to use Title VII as the relevant statute upon which to bring his APA claim, the suit should have named the head of the EEOC, instead of the entity and Defendant ALJ Mulligan.

Therefore, Plaintiff's APA claim against Defendants is not properly before the Court and this Court lacks subject matter jurisdiction because Defendants are immune from suit under sovereign immunity.

B. Failure to State a Claim

Not only does the Court lack jurisdiction, Plaintiff has failed to state a claim on which relief can be granted. The APA is a procedural mechanism to enforce substantive rights contained in other statutes and does not by itself provide substantive rights. El Rescate Legal Servs., Inc., 959 F.2d at 753. Plaintiff fails to allege how he was legally wronged within the meaning of a relevant statute, and thus fails to state a claim upon which relief can be granted.

C. Leave to Amend

Federal Rule of Civil Procedure 15(a) provides that leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Although liberally granted, leave to amend is not automatic. The Ninth Circuit strongly favors allowing amendment, and considers a motion for leave to amend under four factors; bad faith, undue delay, prejudice to the opposing party, and the futility of amendment. Royal Ins. Co. of America v. Southwest Marine, 194 F.3d 1009, 1016 (9th Cir. 1999)(quoting Kaplan v. Rose, 49 F.3d 1363, 1370 (9th Cir. 1994). "[L]ate amendments to assert new theories are not reviewed favorably when the facts and the theory have been known to the party seeding amendment since the inception of the cause of action." Acri v. International Assoc. of Machinists & Aerospace Workers, 781 F.2d 1393, 1398 (9th Cir. 1986).

Where, as here, the question before the court centers on whether amending the complaint would be futile, the Court must query whether no set of facts could be proven under the amendment which would constitute a valid claim. Sweaney v. Ada County, Idaho, 119 F.3d 1385, 1392 (9th Cir. 1997) (quoting Miller v. Rykoff-Sixton, Inc., 845 F.2d 209, 214 (9th Cir. 1988)(holding that "[A] proposed amendment is futile only if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense."). See also Ruffolo v. Oppenheimer, 987 F.2d 129, 131 (2nd Cir. 1993) (holding it is not an abuse of discretion to deny leave to amend where granting leave is unlikely to be productive.)

To refute a challenge of futility, a claim must be legally sufficient. See Lerman v. Chuckleberry Pub., Inc., 544 F. Supp. 966, 968 (S.D.N.Y. 1982), rev'd on other gounds sub nom., 745 F.2d 123 (2nd Cir. 1984), cert.denied, 471 U.S. 1054, 105 S. Ct. 2114, 85 L. Ed.2d 479 (1985) (explaining "[u]nless a propsed amendment is clearly frivolous or legally insufficient on its face, the substantive merits of a claim or defense should not be considered on a motion to amend.")

Here, the Court concludes that there is no possible statute that Defendants violated. Plaintiff will be unable to amend his Complaint to allege he suffered a legal wrong or that he was adversely affected or aggrieved within the meaning of a relevant statue. Thus, it would be futile to grant Plaintiff leave to amend.

III. CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss is granted without leave to amend.

Dated: November 18, 2005

/s/ VIRGINIA A. PHILLIPS
VIRGINIA A. PHILLIPS
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
[Filed SEP. 20, 2007]

No. 06-55130
D.C. No. CV-05-00091-VAP
Central District of California

GEORGE BRENT,
Plaintiff-Appellant,
v.
MICHAEL DOMINGUEZ,
Acting Secretary of the Air Force; *et al.*,
Defendant-Appellee.

ORDER

Before: LEAVY, RYMER, and T.G. NELSON,
Circuit
Judges.

We grant Brent's motion to include excerpts of the record with the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote
on whether to rehear the matter en banc. *See* Fed. R.
App. P. 35.

The petition for rehearing en banc is denied.

No further filings will be accepted in this closed case.

APPENDIX E

[LOGO]

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 19848

Washington, D.C. 20036

GEORGE BRENT,

Complainant,

v.

DR. JAMES G. ROCHE, Secretary,

Department of the Air Force, Agency.

Request No. 05A50042

Appeal No. 01A41258

Agency Nos. MD94004, MD94008

DENIAL OF REQUEST FOR RECONSIDERTION

Complainant initiated a request to the Equal Employment Opportunity Commission (EEOC or Commission) to reconsider the decision in *George Brent v. Department of the Air Force,* EEOC Appeal No. 01A41258 (August 26, 2004). EEOC Regulations provided that the Commission may, in its discretion, reconsider any previous Commission decision where the requesting party demonstrates that: (1) the appellate decision involved a clearly erroneous interpretation of material fact or law; or (2) the appellate decision will have a substantial impact on the policies, practices, or operations of the agency. *See* 29 C.F.R. § 1614.405(b).

After a review of complainant's request for reconsideration, the previous decision, and the entire record, the

Commission finds that the request finds that the request fails to meet the criteria of 29 C.F.R. § 1614.405(b), and it is the decision on the Commission to deny the request. The decision in EEOC Appeal No. 01A41258 remains the Commission's final decision. There is no further right of administrative appeal on the decision of the Commission on this request for reconsideration.

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION(P0900)

This decision of the Commission is final, and there is no further right of administrative appeal from the Commission's decision. You have the right to file a civil action in an appropriate United States District Court **within ninety(90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work.

RIGHT TO REQUEST COUNSEL (Z1199)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. *See* Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq,;* the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794 (c). **The grant or denial of the request is within the sole discretion of the Court.** Filing

a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

FOR THE COMMISSION:

/s/ Carlton M. Hadden, Director
Carlton M. Hadden, Director
Office of Federal Operations

NOV 04 2004
Date

CERTIFICATE OF MAILING

For timeliness purposes, the Commission will presume that this decision was received within five (5) calendar days after it was mailed. I certify that this decision was mailed to complainant, complainant's representative (if applicable), and the agency on:

NOV 04 2004
Date

/s/ [Illegible]
Equal Opportunity Assistant